



After the Title IX Hearing: Appeals

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Your Facilitator



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Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.



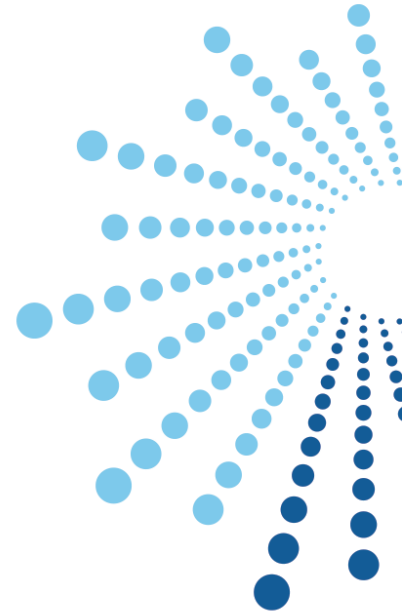
Today's Agenda

01

Appeals

02

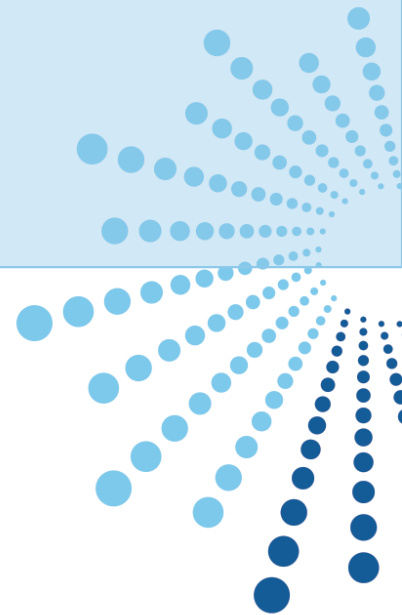
Common Errors on Appeal





Appeals

01



In Short...



Title IX



Appeal Officer(s)

Differences in Burden

COLLEGE/ UNIVERSITY	Figure out what happened and get to the truth of the matter, & error correction
COMPLAINANT RESPONDENT	Persuade and point out error with supporting evidence or facts



Who Can File



Either party has the right to file an appeal, which is reviewed by an annually trained appeal reader, who does not have any other role in the process. Only decisions reached through a hearing can be appealed and must be submitted in writing within five business days of the written determination regarding responsibility.



QUESTION: If you do not attend the hearing, can you appeal?

Timing is Everything

The parties will be notified in writing when an appeal is submitted. The non-appealing party will receive a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome. If the non-appealing party wishes to submit a written statement, that party shall do so within five business days of receiving written notification of the appeal.



Grounds for Appeal

- i. Procedural irregularity that affected the outcome;
- ii. New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome;
- iii. The Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.



Was an appeal filed?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds

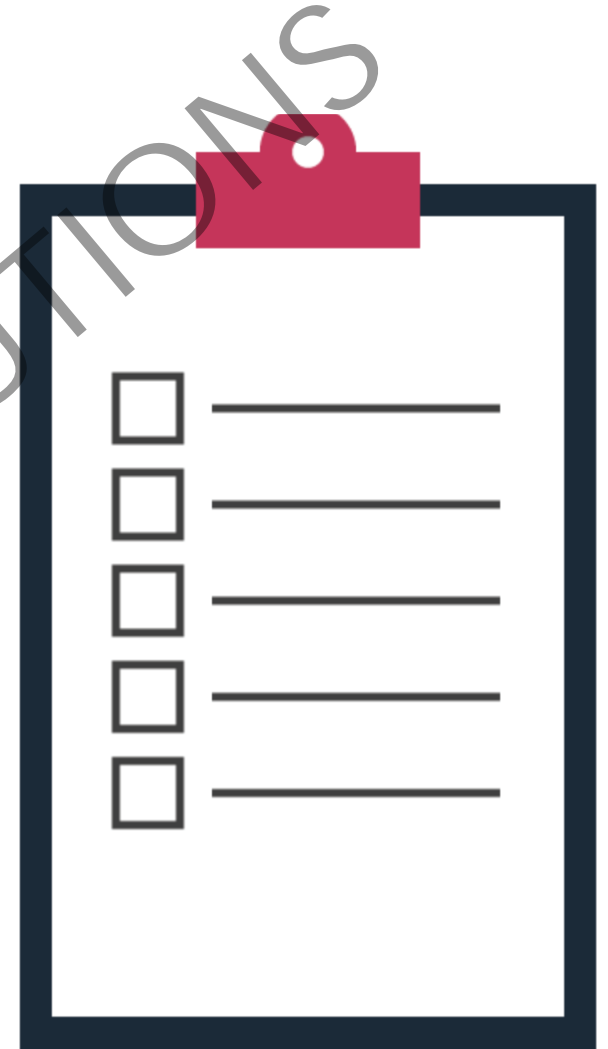
This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.



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What Does This Mean?

- You are reviewing the appeal for what it says, not how it is said.
- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.



Your Grounds for Appeal

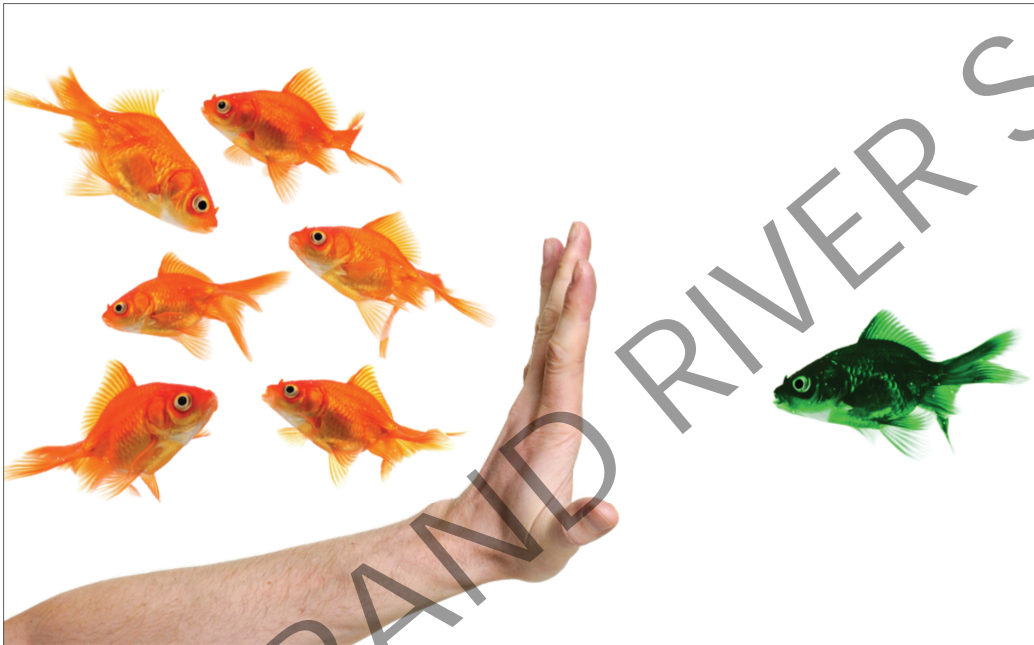
Procedural

- Bias/conflict of interest
- Error

New information

Affected the outcome

Bias



- What constitutes bias?
- The investigator was biased against me because...
- The investigator was biased against (complainants/respondents generally) because . . .

Allegations for Bias

“Pro-victim bias does not equate to anti-male bias.”

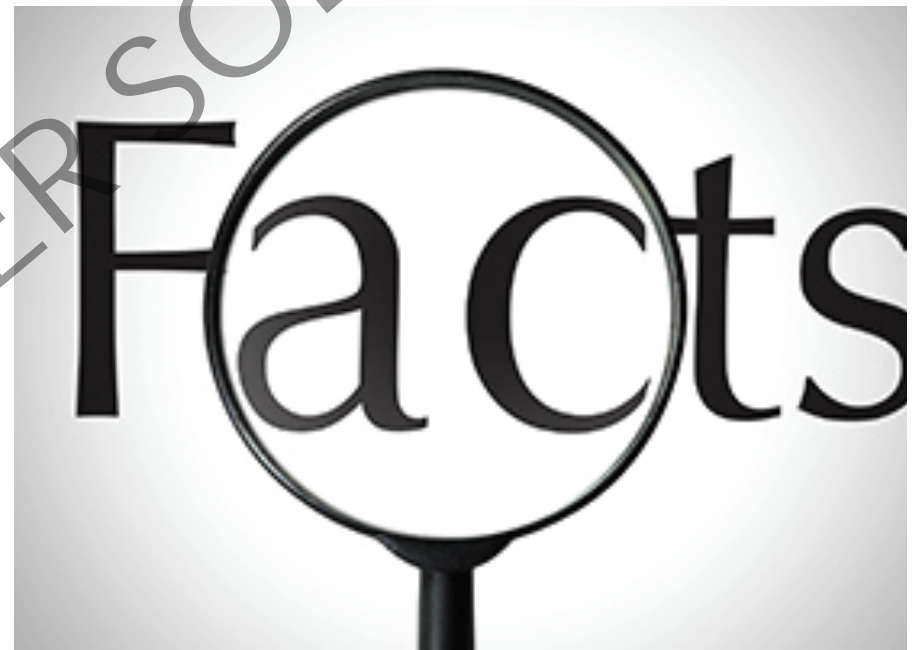
-Doe v. University of Colorado

Anti-violence bias does not equate to anti-male bias.

Allegations of Bias as the Basis for Appeal

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado



New Information

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates new information?
- Timeline



New Evidence: What Would You Do?

Appeal states there is
new evidence...

Evidence not provided
with the appeal

How do you know it is
new?

It is new but is it
relevant and reliable?

Procedural Error

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent

Sometimes Institutions Do the Wrong Thing



- ❖ Missing deadlines for providing materials
- ❖ Misunderstanding of affirmative consent
- ❖ Errors at a hearing

Dear Appeals Officer...

I am the victim of a false accusation...

- The police were not contacted and I was not charged by law enforcement with a crime
- After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party
- No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.



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Denial of A Process You Don't Offer



Representation

Discovery



Subpoena / compel
witnesses



When a Party Refuses to Participate in the Process but Appeals the Process

"The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him."

- Herrell v. Benson



Common Errors on Appeal

02



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Evidence

Direct

Circumstantial

Character



Evidence – Knowing What to Consider

Drunk vs. Intoxicated vs.
Incapacitated

Language matters

Clarity and consistency of application

Who has to prove
consent?

Know the language of your policy

DANGER

**DO NOT
ENTER**

**De Novo
Appeals**



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Appeals Panels That Exceed Their Authority

- Stay in your lane
- How do you know
- How to correct



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Sanctions Are Now Wrong Because Finding Was Wrong

Does appeals officer determine new sanction, or send case back for appropriate determinations?



Solutions When you Err*

- Re-do and get it right.

Lesser-Included Charges on Appeal**

- There are no lesser-included charges.
- Reflects lack of notice and opportunity to respond.

When a Sanction Changes Due to an Appeal***

Appeals panel “sua sponte and without any explanation recommended enhancing the penalty to expulsion.”

*John Doe v. University of Kentucky; Doe v. Alger; **Powell v. St. Joseph's University; Doe v. U.S.C.; ***Haug v. SUNY Potsdam



You've Identified the Problem... What Now?

The parties will receive written decision regarding the appeal describing the results of the appeal and the rationale for each result. If the appeal is granted, the matter shall be either referred to the original Hearing Officer for re-opening of the hearing to allow reconsideration of the original determination or the appeal reader will determine any change in sanction. If an appeal is denied, the matter shall be considered final.

Documenting the Appeal

Policy

- Rights
- How notified
- Who decides
- Step-by-step process
- Communications

Outcome

- Notification
- Decision
- Rationale
- Record-keeping
- Office of record

Questions?



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Appeals Training Hypothetical

Dear Appeals Officer,

I am writing to appeal the Title IX investigator's investigation and the determination made by the Student Conduct Officer in the case filed against me.

I want to start by letting you know that I take the crime of sexual assault very seriously, and agree that any criminal who engages in a sexual assault should be punished to the fullest extent of the law. It is important to note here that law enforcement was never contacted, and no charges were brought against me. There was no crime committed here.

First, there was no sexual assault in this case. Debbie and I have been in three classes together in the last year, and we often studied together. Even after this alleged sexual assault, she sent me a friend request on Instagram. She also asked me to dance when we saw each other at a party the week after the alleged sexual assault. To think that I would become a victim of a false allegation is something I never thought would happen to me when I got to college. To think that my explanation has fallen on deaf ears is even worse. Please undo this incredible wrong by reviewing the evidence so that you can properly find that I did not sexually assault Debbie.

Appeal Ground #1: Procedural irregularity that affected the outcome:

1. The investigator did not interview Mr. Uberlyft, the driver who drove Debbie home. I asked the investigator to interview Mr. Uberlyft, but the investigator did not do so. Had he been interviewed, he surely would have been able to provide testimony that Complainant was not drunk, not slurring her words, and certainly not incapacitated.
2. While Complainant was supported by an entire victim advocacy office, I did not have a campus advocate. No one helped me prepare for interviews or told me what to bring, no one helped me to write this appeal, and I was overwhelmed. As a result of the stress of this case, I am now failing two classes.
3. I was denied the opportunity to have an attorney make objections at the hearing and raise the argument that the investigation had made an error. I was told that my right to hire an attorney to advocate for me would be denied.
4. The hearing panel was supposed to have 3 members. One member recused herself because of a conflict, and no one was appointed in her place. Therefore there were only 2 members, which violates my right to a fair hearing.
5. The determination as to whether or not there was affirmative consent unfairly shifted the burden to me to prove that there was consent, rather than having the burden on the person making the allegation to show that there was not consent.

Appeal Ground #2: The decision-maker had bias against me that affected the outcome.

1. No reasonable person could say that I did this. Debbie is the one who initiated the sexual contact, and she is the one who started removing her own clothing. She also put her hand and forehead on my chest, which is a very intimate thing to do. It is unreasonable to say that the evidence suggests I assaulted her.
2. The decision stated that I did not get consent. That is incorrect. She gave consent, but the investigation determined it was not “sufficiently clear” consent. This is ridiculous. Also, this unfairly shifted the burden of proof to me, as noted above.
3. Even if she was really drunk, there is no way I could have known she was incapacitated. How could I have known? It is unfair to say that I knew she was incapacitated, and no reasonable person could come to that conclusion.
4. Because the decision is unreasonable, it is clear that the Decision-Maker is biased.
5. Last year, the Decision-Maker walked in the “Victims Bill of Rights” walk-a-thon, and the year before attended a fundraiser for the local rape treatment center, and posted photos of attending the event on her Instagram. The Decision-Maker is clearly biased against anyone accused of rape.

Appeal Ground #3: New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome:

1. Complainant stated that she had a medical exam after the alleged assault, but she did not offer any proof. Also, during the hearing, I was not allowed to ask any questions about the medical exam. I believe that she should provide proof that she went to get the medical exam and, if she cannot provide that proof, then that is new evidence to show that she is lying.
2. In addition, I recently learned that Debbie has gotten into an honors class for this quarter. She could only have gotten into that course if she had done well the first quarter, which proves she was not traumatized and therefore not sexually assaulted.
3. I recently learned that the Decision-Maker is biased against me, which I did not know until I read the report. I could not have known of this demonstrated bias until receiving the Decision-Maker’s report.

Because I was wrongfully found responsible, the sanction is also wrong. Two years is an exceedingly long penalty for someone who did not commit any crime, but is particularly inappropriate here because, even had I been properly found responsible for a sexual assault (and, again, I was not), the wrong sanction was applied.

I consumed at least as much alcohol as did Complainant, and I was, at most, only slightly affected by the alcohol. She is the one who asked for the drinks, and I delivered them to her, at her request. I had no intent to hurt her or have sex with her, and no intent to get her drunk, and certainly no intent to incapacitate her. As evidence that I did not intend to hurt her, I called



her, twice, in the days after we met at the party, in order to check on her and see if she was doing well. That behavior is not consistent with being a rapist and proves that I had no intent to incapacitate her in order to have sex with her. Also, the fact that she later wanted to be my friend, and asked me to dance, supports that she knows, deep down, that I had no intent to get her drunk or have sex with her against her wishes.

Even if you were to find that I engaged in sexual misconduct, it is unreasonable to find that the sanction should be a two-year suspension. Last year, someone received only a one-year suspension for violating the same policy. If the panel finds there was any wrong done, perhaps due to any miscommunication, then the only appropriate sanction should be additional training, a non-contact order, and an agreement from me that if ever Debbie and I were to end up in the same class or dorm, I would gladly be the one to move. I will never again have sex with anyone who has had a drink, and so there is zero likelihood that I pose any danger to the community as I continue my studies. Therefore, a two-year suspension that will entirely derail my career is inappropriate and unfair.

Sincerely,

Robert Respondent

